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Nos. 14-556, 14-562, 14-571 & 14-574

In The

Supreme Court of the United States

JAMES OBERGEFELL, et al.,

Petitioners,

v.

RICHARD HODGES, Director,
Ohio Department of Health, et al.,

Respondents.

[Additional Captions On Inside Front Cover]

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* 47 SCHOLARS IN SUPPORT OF RESPONDENTS & AFFIRMANCE

ROBERT P. GEORGE
Counsel of Record
ROBINSON & MCELWEE
700 Virginia Street East
Suite 400
Charleston, WV 25301
(304) 344-5800
rgeorge@princeton.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

VALERIA TANCO, et al.,

Petitioners,

v.

"BILL" HASLAM, Governor of Tennessee, et al.,

Respondents.

APRIL DEBOER, et al.,

Petitioners,

v.

RICK SNYDER, Governor of Michigan, et al.,

Respondents.

GREGORY BOURKE, et al.,

Petitioners,

v.

STEVE BESHEAR, Governor of Kentucky, et al.,

Respondents.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Professor Robert P. George (B.A., Swarthmore College; J.D., M.T.S., Harvard University; D.Phil., University of Oxford) has been a Visiting Professor at Harvard Law School and is McCormick Professor of Jurisprudence at Princeton University. *Amicus* Sherif Girgis (A.B., Princeton University; B.Phil., University of Oxford-Rhodes Scholar) is a research scholar of the Witherspoon Institute currently pursuing a Ph.D. in philosophy at Princeton University and a J.D. at Yale law School. Affiliations are for identification purposes.

Amici have studied and published on the moral, political, and jurisprudential implications of redefining marriage to eliminate the norm of sexual complementarity and have expertise that would benefit this Court. Their article, "What Is Marriage?" appeared in the *Harvard Journal of Law and Public Policy*. Their book, *What Is Marriage? Man and Woman: A Defense*, further develops their philosophic defense of marriage as a conjugal union, and was cited twice by Justices Thomas and Alito in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

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[1] The parties all have consented to the filing of this brief. *Amici curiae* also represent that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici, listed in the Appendix, are scholars of various disciplines, including law, government, philosophy, history, and the natural and applied sciences. While they have different views about sexual and familial ethics, they are united in the conviction that the Constitution leaves the policy question at issue here to the ordinary political processes. Institutional affiliations are included for the purpose of identification only.

SUMMARY OF THE ARGUMENT

Moral claims touching on the equal dignity of self-identified members of sexual minority groups, a child's entitlement to a mother and father, and a democratic polity's right to self-determination can be appropriately assessed and settled in the normal political process and have been here by the people of Michigan, Ohio, Kentucky, and Tennessee.

Petitioners believe that these States' marriage laws harm the personal dignity of same-sex partners and of the children they rear. But no one disputes the equal dignity of every human being, regardless of how they identify or live their lives. Petitioners' belief assumes, falsely, that the Constitution requires the State to change its institutions expressly to affirm sexual minorities. It also misunderstands the social purpose of marriage law, which never has functioned – and *could never* function – as a mechanism for

affirming adults' individual worth by recognizing any consensual bond of their choice. Accepting this view would have absurd logical implications and harmful effects.

First, by dissolving the links between marriage and any historic marital norm besides consent, it would harm the States' material interest in providing children with stable ties to their own parents. It would undermine their right to be reared by their own parents wherever possible – a right affirmed by the United Nations Convention on the Rights of the Child.

Second, it would deprive the States of any limiting principle for their marriage laws.

Third, it could also spread the dignitary harms that children often suffer when deprived of the sense of identity and self-worth that can come from a stable bond to their own mother and father.

And fourth, by reducing marriage to a mark of social inclusion and equality, it would – ironically – spread the very social message it was intended to oppose: that those outside the institution of marriage matter less.

In these ways, finally, it would deprive the People and the States of Ohio, Michigan, Kentucky, and Tennessee of their own right to settle the purposes and contours of family policy for themselves – a right they can exercise, and have exercised, while respecting the

social equality, and personal and romantic freedoms, of same-sex partners in full.

ARGUMENT

This brief discusses three moral claims implicated by the question of whether States remain free to define as marriage a conjugal relationship, viz., inherently the union of husband and wife. The first is the claim for the equal dignity of men and women in same-sex partnerships. The second is the claim that each child is entitled to be reared, where possible, by her married mother and father. The third is the legal and moral claim of the People and of the States to deliberate and decide for themselves precisely which of these important purposes to tailor their marriage law to serve, and which to serve by other policy means.

Although some of the lower-court decisions on same-sex marriage imply that these claims are in competition, the people of the Respondent States, and of most others, would disagree, as expressed by their enactments of constitutional amendments and statutes preserving the legal definition of marriage as a conjugal (inherently male-female) union.

I. The social meaning of marriage is inseparable from its morality-based social purpose, which is to promote the formation of stable bonds between men and women for the sake of their children.

The argument from dignity fails in this case because it seriously misunderstands the social functions and implications of marriage law. It is impossible to make sense of the institution of marriage as expressing adults' personal worth by recognizing the consensual bond of their choice, or indeed in any way apart from its historic social purposes – which are ultimately based on the moral claims of children born to opposite-sex couples.

A. Rather than expressing general approval of an adult relationship, marriage serves specific child-focused interests that shape and limit its social meaning.

Marriage recognition is not – and never has been – the vehicle for affirming the equal worth of adult citizens or the children they rear. Indeed, it cannot be: everyone should be equal under law, yet some will never marry, and some children will always be reared in households led by partnerships of types that are ineligible for legal recognition.

Nor does civil marriage simply distinguish favored from disfavored types of *relationships*. Again, countless loving bonds – romantic or not, familial or friendly, of various sizes and levels of formality and

commitment and closeness – go legally unrecognized, without any denigration of their worth.

If marriage law simply expressed generic approval of people or the relationships of their choice or their children, it would be easy to build an Equal Protection-based argument for recognizing all loving, consensual bonds upon request. But because marriage law has always served more specific, child-focused social purposes, and, indeed, developed precisely to do so, there is no direct line from the principle of equality to a right to redefine marriage to abolish the norm of sexual complementarity.

That is, both sides of our national marriage debate want the law to treat marriages equally. Both, in that sense, favor marriage equality. What they disagree on is which social purposes marriage should serve and how best to serve them – i.e., the social meaning of marriage that is to be applied equally.

But one must first assume a position on the meaning and social purposes of marriage to know whether a State's marriage policy treats similarly situated relationships alike. And while the Constitution requires equality before the law, it doesn't require any particular set of social purposes to be embodied in marriage law. *See United States v. Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) ("The Constitution does not codify either of [the more traditional or purely consent-based] views of marriage."). So concerns about the dignity of adults in loving bonds, or about the social standing of those

they rear, cannot operate without more specific assumptions about what marriage policy is for. It is to that crucial subject that we now turn.

B. Throughout history and in the United States, a central social and moral purpose of marriage law has been to promote the formation of stable bonds between men and women for the sake of children born of their union.

In virtually every culture, marriage as a social institution has served the purpose of maximizing the chances that children will be reared by their biological mother and father in a committed bond. This purpose has been recognized as a moral right by, for example, the United Nations Convention on the Rights of the Child. Moreover, as a group of respected family scholars has noted, "as a virtually universal human idea, marriage is about regulating the reproduction of children, families and society." W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS 15 (2d ed. 2005). Another historian has noted that "[m]arriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies." G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988).

This moral understanding – i.e., an understanding based on the moral claims of children to a father and mother – has been consistently reflected in U.S. law. Justice Joseph Story explained: "[m]arriage is not treated as a mere contract between the parties. . . .

But it is treated as a civil institution, the most interesting and important in its nature of any in society. Upon it the sound morals, the domestic affections, and the delicate relations and duties of parents and children essentially depend." JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 168 (1834). Perhaps the most prominent treatise writer in mid-nineteenth century America, Joel Prentiss Bishop, wrote that "[m]arriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby." JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 225 (1st ed. 1852).

The same moral understanding persisted throughout the 20th Century. Frank Keezer's 1923 family law treatise stated: "Marriage is universal; it is founded on the law of nature" in which "[n]ot only are the parties themselves interested but likewise the state and the community" since it is "the source of the family." FRANK H. KEEZER, A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE § 55 (1923). He specifically defined "legal marriage" as "a union of a man and a woman in the lawful relation of husband and wife, whereby they can cohabit and rear legitimate children." *Id.* at § 56.

Indeed, the same view – a view based on the moral claims of children to a father and a mother – was once widely accepted by State and federal courts. Early in its history this Court stated that "no legislation can be supposed more wholesome and necessary . . . than that which seeks to establish it on the basis

of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). A few years later, the Court defined marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

C. Judged by the historic social purposes of marriage, restricting civil marriage based on race or nationality is arbitrary while the Respondents' marriage laws are principled and just.

Petitioners cite this Court's cases on the right to marry, but those cases support rather than condemn Respondents' marriage laws. When the Court first applied the fundamental right to marry to invalidate a State regulation dealing with marriage, it cited two cases as precedent, both centered upon procreation and the family. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The first was *Skinner v. Oklahoma*, which had explicitly linked marriage and procreation: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The second was *Maynard v. Hill*, which, as noted above, called marriage "the foundation of the

family," *Maynard*, 125 U.S. at 211 – thereby implicitly recognizing the moral claim of children to a mother and father.

State courts addressing arguments for redefining marriage have noted the links between marriage and procreation in the right-to-marry cases. The Washington Supreme Court recognized that "[n]early all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and childrearing." *Andersen v. King Cnty.*, 138 P.3d 963, 978 (Wash. 2006). And Maryland's highest court concurred in this recognition:

> All of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species. . . . Thus, virtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves participation (in ways either intimate or remote) by a man and a woman.

Conaway v. Deane, 932 A.2d 571, 621 (Md. 2007).

This child-focused social purpose of marriage law only highlights the arbitrariness of the interracial marriage ban struck down in *Loving*: race simply has nothing to do with conjugal union or family life; indeed, interracial marriage was recognized at the

common law inherited from England. *See* Irving G. Tragen, *Statutory Prohibitions Against Interracial Marriage*, 32 Cal. L. Rev. 269, 269 n.2 (1944). Colonial and later State bans could only have been introduced to promote "White Supremacy," as the *Loving* Court held – the very evil that the Fourteenth Amendment and its Equal Protection Clause were ratified to combat.

By contrast, the historic child-focused social purpose of marriage explains the nearly universal norm of sexual complementarity. And it is historically impossible to attribute that norm to hostility to men and women in same-sex relationships across cultures of radically different degrees of awareness of, and different attitudes toward, same-sex sexual activity and partnerships.

In short, the conjugal vision and understanding of marriage as inherently opposite-sex is based not merely on a particular view about sound social policy, but also on the crucial *moral* claim of a child to know and (where possible) be raised by the mother and father who gave her life. If any moral claims are to be considered here, that one must be given serious consideration and ample weight.

II. The equal dignity of self-identified sexual minorities cannot constitutionally require the redefinition of key social institutions.

Advocates of redefining marriage as something other than a conjugal relationship of man and woman sometimes express concern that the Respondent

States' marriage laws deprive same-sex partners and their children of their moral claim to dignity. This assumes that the Constitution mandates changing the meaning and purposes of social institutions to affirm sexual minorities. It assumes that marriage law in particular is a means of conferring social dignity on individuals (and any children they rear) by recognizing the loving bond of their choice.

But that cannot be right.

Men and women in same-sex partnerships and the children they rear have the same inestimable dignity and worth as every human being. So do those who identify as transgender, asexual, polyamorous, or in other ways that might evade neat classification under the traditional LGBT label. But accepting the assumption that the personal dignity of individuals in loving bonds – or the dignity of sexual minorities generally – is what marriage law affirms would logically entail a constitutional right to recognition of *any* loving consensual bond at all. It would harm more prosaic but quite important policy goals currently served by the States' marriage laws, particularly the moral claim discussed above – namely the right of children to be reared whenever possible by their married mother and father. *See* United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 47. In fact, acting on such an assumption about the purpose of marriage law would undermine the very dignitary concerns that motivate petitioners' action in the first place.

A. If marriage law violates people's dignity by leaving out the loving bond of their choice, no principled basis remains for limiting marriage to two-person or permanently committed bonds, or for limiting institutional recognition of sexual minority groups to gays and lesbians.

To find for Petitioners is to redefine the public understanding of marriage into whatever same- and opposite-sex couples can have in common but ordinary co-habitants lack: namely, committed romantic emotional union. But there is no reason of principle that a deep emotional union should be permanently committed, rather than temporary by design; or limited to two-person bonds, rather than multiple-partner (polyamorous) ones.

In other words, people from many kinds of companionate (and romantic) relationships, and children are reared in households of every size and shape. Thus, for example, *Newsweek* reports that there are more than 500,000 polyamorous households in the United States *alone*. Jessica Bennett, *Only You. And You. And You: Polyamory – Relationships with Multiple, Mutually Consenting Partners – Has a Coming-Out Party*, NEWSWEEK, July 28, 2009, http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html.

And these are the critical points: The partners in these multiple-partner relationships are no less deserving of equality before the law. Their children are no more immune to social stigma. Thus, if marriage law is re-engineered to be an instrument for expressing

social approval and inclusion by recognizing people's romantic bond of choice, why shouldn't it be redefined to include these and all other loving, consensual bonds? There is no answer to this challenge – which explains why Petitioners have not proposed one to this Court or the courts below.

To the contrary, many same-sex marriage advocates have embraced these implications of their view that civil marriage is about conferring social dignity by recognizing a person's preferred romantic bond: More than 300 prominent, mainstream LGBT and allied scholars and advocates have argued for recognizing sexual relationships involving more than two partners, as well as deliberately temporary sexual (and even non-sexual) relationships. *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), http://beyondmarriage.org/full_statement.html. Their logic is irresistible *if* equal citizenship and social standing, or the needs of children in non-traditional homes, require recognition of one's preferred relationship, regardless of shape or size.

Likewise, while many private institutions have actively accommodated an increasing number of emerging sexual-minority groups, and States are free to do the same, nothing in the Constitution does or *feasibly could* require them to do so. In the field of higher education, for example, all-women's colleges are developing admissions policies for transgender students, including biological males who identify "as a woman" or "as other/they/ze" or indeed as neither

man nor woman. *Admission of Transgender Students*, Mount Holyoke College, https://www.mtholyoke.edu/policies/admission-transgender-students.

Other institutions, meanwhile, are working to accommodate a wider range of emerging identity groups than that designated by the traditional LGBT abbreviation. *See, e.g.*, *Open House*, Wesleyan Univ., http://www.wesleyan.edu/reslife/housing/program/open_house.htm?utm_source=StandFirm&utm_medium=post&utm_campaign=link (advertising a home aimed at providing "a safe space for Lesbian, Gay, Bisexual, Transgender, Transsexual, Queer, Questioning, Flexual, Asexual, . . [and, among others] Polyamourous, (LGBTTQQFAGPBDSM) communities and for people of sexually or gender dissident communities").

But these sexual and gender minority communities are not just numerous; identities based on them tend to differentiate further over time, with the members of each identifying diverse and evolving needs. However private entities respond, and whatever a State's policy response should be, no one supposes that any Constitutional principle does – or feasibly *could* – require the States to change all potentially relevant civil institutions to give these groups express recognition *as groups* within each. By the same token, there can be no constitutional requirement to revamp civil marriage in an effort to change social mores surrounding same-sex partnerships in particular.

B. Promoting a flexible vision of marriage defined by any deep companionship would further undermine family stability, which can inflict *dignitary* harms on children denied the knowledge and security of their mother and father's stable love.

If the States redefine marriage to include consensual relationships of deep personal significance to the partners, stabilizing marital norms like permanence and exclusivity will come to seem arbitrary. In practice, then, marriages are likely to take on the variety and flexibility of companionship into which it will have been assimilated.

The more people think of marriage as a form of deep emotional regard (which may be inconstant), or a means of individualist expression (which sexual fidelity might hamper), the less they will see the point of permanence or exclusivity. Because *these norms have no principled basis if marriage is defined by emotional union, and not as a conjugal (inherently opposite-sex) relationship, they will likely come to seem just as arbitrary to expect of all marriages as sexual complementarity now seems to same-sex marriage advocates.*

In other words, redefining civil marriage to eliminate the principle of sexual-reproductive complementarity might entrench what Johns Hopkins sociologist (and same-sex marriage supporter) Andrew Cherlin, among others, calls the "expressive individualist" model of marriage. ANDREW CHERLIN, MARRIAGE-GO-ROUND:

THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 29 (2009). On this model, Cherlin writes, a relationship that no longer fulfills you personally is "inauthentic and hollow," and you "will, *and must*, move on." *Id.* at 30 (emphasis added).

But as social scientific evidence shows, spouses who internalize this model of marriage as primarily about emotional fulfillment are more prone to conflict and divorce. *See* W. Bradford Wilcox, *Is Love a Flimsy Foundation? Soulmate Versus Institutional Models of Marriage,* 39 SOC. SCI. RES. 687 (2010).

Moreover, recognizing same-sex bonds as marriages would send the message – which other public institutions would reinforce – that it matters not, even as a rule, whether children are reared by their biological kin, or by a parent of each sex at all; indeed, that it is *bigoted* to think otherwise. As this message is internalized – as mothers and fathers each come to seem optional – it will be harder to send the message that fathers, say, are essential. Men are likely to feel less urgently any responsibility to stick with their wives and children to offer any distinctive benefits of paternity, and men and women are less likely to feel motivation or social pressure to commit to each other in marriage before having children in the first place.

But while the merits of same- and opposite-sex adoptive parenting are in dispute, virtually everyone accepts the distinct benefits of marital stability for children. And because family stability and the knowledge

and secure love of one's biological parents can promote children's sense of identity and self-worth, these effects would include dignitary harms.

Thus, whether by relativizing the importance of male-female and/or biological parenting, or by obscuring the point of norms like permanence and exclusivity, redefining marriage threatens to reduce stability in households across the board, including ones with children.

So even if some dignitary interests favored redefining marriage law, they would have to be balanced against the significant potential social harms – including the dignitary harms for some children – of risking further family instability by promoting a more flexible vision of marriage. Yet to balance the costs and benefits of rival policy schemes – including the moral claims of abandoned partners and children whom changing social mores might leave without one or both their biological parents or a parent of each sex – is the role of the People and their elected representatives, not the courts.

C. Using marriage law as a mechanism of expressing social inclusion is self-defeating: it further marginalizes those who remain unmarried, as well as any children they might rear.

Finally, if marriage law *does* come to be seen as a means of bestowing social approval on individuals, rather than promoting certain expectations of certain

relationships for specific social purposes, the effect *really will be* to marginalize those who aren't, or can't be, or don't wish to be in marriages – along with the children they rear. And there will always be such people, under any marriage policy: after same-sex civil marriage, for example, anyone who finds most personal satisfaction in multiple-partner bonds, or cannot find a mate, or chooses to have children alone (perhaps later in life) by adoption or artificial reproduction.

By contrast, the more the States link marriage to *specific* social purposes, the less marriage law will seem like a statement about individuals' personal dignity, inside marriage or out, or about that of their children.

That is, as law and culture make clear that the public purpose of marriage is to link children to their own mother and father and to vindicate their moral claim to be reared by the same, people will be less likely to read into the law (mistakenly) an endorsement of animus toward those who do not marry.

III. States can enshrine the conjugal view of marriage without depriving same-sex partners of liberty. The freedom to pursue romantic and familial companionship is not at stake here.

Many people find fulfillment in the companionship of marriage, but the Respondent States' laws on marriage *deny its companionate ideals to no one.*

They do not ban them, or discourage them by targeted civil disabilities. Indeed, they leave more, not less, social space for pursuing many of these ideals outside the context of marriage.

A. *Romer* and *Lawrence* mean that redefining marriage is unnecessary to ensure that Americans, including those identified as gay or lesbian, enjoy personal liberty in their relationships, free of targeted disabilities.

Under rights found in *Lawrence v. Texas*, 539 U.S. 558 (2003), whatever a State's marriage policy, two men or two women will be free to live together, with or without a sexual relationship or a wedding ceremony. (By contrast, for example, bigamy in many States remains a criminal offense.) The same-sex civil marriage debate is not about anyone's private behavior but about legal recognition. The decision to honor conjugal marriage legally *bans nothing*.

But neither do conjugal marriage laws *discourage* companionship by penalizing those who seek it outside the union of a man and woman. Under *Romer v. Evans*, after all, the States simply may not impose "special disabilit[ies]" targeted at gays and lesbians. 517 U.S. 620, 631 (1996).

Indeed, together *Lawrence* and *Romer* provide ample basis for overturning any potential policy decision rooted in animus against gays and lesbians – or indeed any criminal or civil sanction based on one's

status as a sexual minority, whether gay or lesbian or otherwise.

Nor do the States' marriage laws impair same-sex partnerships by robbing them of public status: This debate is not about whether to discourage same-sex sexual relationships or keep them hidden, but whether to uphold specific social norms for linking men and women to each other and their children. *See* Brief for Scholars of Marriage as Amici Curiae Supporting Petitioners at 4-12, *Obergefell v. Hodges*, No. 14-566 (U.S. Mar. 6, 2015) (detailing norms conveyed by man-woman definition). Openness and publicity do not require *legal* status. Even among bonds that all agree are of great personal value, the State may (by its institutions) mark clear distinctions where blurring them would harm a public interest. And the common good is served when the State reinforces the systematic importance of ensuring that children, wherever possible, know and are known by, and love and are loved by, their own mother and father, as the moral claim described above compels. *Id.*

Nor, finally, can there be a constitutional requirement for a State to *encourage* by its policies the companionship some would seek in same-sex partnerships. For one thing, again, there would be no limiting principle to such a norm. Among all the forms companionship can take, which should the Respondent States' laws single out? Legal recognition makes sense only where *regulation* does: these are inseparable. The law, which deals in generalities, can regulate only relationships with a definite structure.

Such regulation is justified only where more than private interests are at stake, and where it would not obscure distinctions between bonds that the common good relies on.

The only romantic bond that meets these criteria – and the only bond that implicates the child's moral claim to be raised by her own mother and father wherever possible – is the conjugal relationship that alone can link children to the man and woman whose union gave them life, the relationship historically known as marriage.

B. Concerns about children of same-sex couples who have legally married as a result of prior judicial decisions – or about adoption by same-sex couples generally – are legally separable from this case and can be addressed through other means.

Two common concerns on behalf of Petitioners – about same-sex couples in Michigan and some other States who have contracted civil marriages in reliance on other federal court decisions, and about adoption by same-sex couples – do not require the redefinition of civil marriage.

The legal incidents of same-sex marriages already contracted in reliance on lower-court decisions would presumably be treated as "vested rights," which this Court has long recognized may not properly be abrogated by subsequent action.

In the statutory context, for example, this Court has held that "the presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). .

And on judicial decisions in particular, this Court has noted, "[a]n injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be." *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922); *see also Walker v. Birmingham*, 388 U.S. 307, 314 (1967).

There is no reason to believe that these principles would not control in any actions related to legal incidents attained in the wake of court orders requiring same-sex marriage recognition.

Indeed, the two leading court decisions on this question have resolved it in just this way. In 2009, the California State Supreme Court ruled that same-sex marriages contracted after its own previous decision requiring their recognition, but before the passage of California's Proposition 8, remained valid. The Court read Proposition 8 not to apply retroactively, precisely

to avoid the constitutional problems inherent in retroactively denying the "acquired vested property rights" that plaintiffs had "as married spouses with respect to a wide range of subjects, including, among many others, employment benefits, interests in real property, and inheritances." *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

On the same grounds, a judge gave Utah's conjugal marriage laws a similarly narrow reading in a case upholding the validity of marriages contracted before the stay of a previous court decision striking down those laws. *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343 (D. Utah May 19, 2014).

Courts could do likewise in the wake of a decision by this Court upholding the States' freedom *prospectively* to limit marriage recognition to opposite-sex relationships.

Relatedly, same-sex partners' ability to adopt children is legally separable from the question of what the Constitution requires of States regarding marriage, as evidenced by States that have allowed adoption by same-sex partners while recognizing only opposite-sex marriages. *See, e.g., In re Adoption of Doe*, 326 P.3d 347 (Idaho 2014) (construing statute to allow adoption by same-sex couples despite unavailability of same-sex civil marriage). In short, any constitutional issues surrounding adoption by same-sex couples can and should be resolved as they arise in future cases. The Court need not attempt to address such issues here.

IV. States can define and have defined marriage as a conjugal union without undermining the equal dignity of those in same-sex relationships or of the children they rear.

All human beings, regardless of their romantic desires or relationship choices, have equal dignity and title to all the same civil rights. States can respect this principle in full while continuing to promote the distinct benefits of a male-female marriage scheme in law and culture. In doing so, they can vindicate the moral claim of children to be raised by their own mothers and fathers whenever possible.

A. Lawmakers can meet the practical needs of all types of households without re-engineering marriage, and doing so directly can be more effective.

Many cite the practical needs of same-sex partners living together – needs regarding property, tax, and hospital visitation, among other things – as a reason to recognize same-sex civil marriage. One might similarly cite the needs of children reared in such homes – for education-based tax credits, and so on.

But suppose the law grants such legal benefits to two men in a sexual partnership. Should it not also grant them to bachelor brothers committed to sharing a home? The brothers' bond would differ in many ways of deeply personal significance, of course. But tax breaks and inheritance rights would make just as

much sense for them if they, too, would share household burdens, and that common stock of memories and sympathies that makes each the other's best proxy in emergencies and beneficiary in death.

Indeed, if the State's goal is to provide same-sex romantic unions with ready access to these benefits, an expansive (i.e., marriage-neutral) scheme would be more effective. It would be available even to same-sex partners who did not want to liken their unions to heterosexual bonds in marriage – an assimilation that makes some same-sex partners see gay civil marriage as a "mixed blessing," if a blessing at all. Katherine M. Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES, June 23, 2011, http://www.nytimes.com/2011/06/24/opinion/24franke.html?_r=0.

A policy that offered legal benefits to any adults – romantic partners, widowed sisters, cohabiting celibate monks – would involve no rival definition of marriage, or the possible harms of such redefinition. So it would square the needs of diverse households with the social purposes served by the Respondent States' marriage laws.

B. States can define and have defined marriage as a conjugal union without denigrating people in same-sex relationships.

Not only *can* the States meet same-sex partners' and others' material needs without redefining marriage; they have done so without denigrating

them or harming their social status or that of their children.

We are each related to people in countless ways that have no legal status, and no one thinks this an offense to social dignity.

Non-recognition as a marriage is only a stigma if it is assumed that marriage is about ratifying loving adult bonds just as such – something it cannot be. If, by contrast, there are different social purposes that traditional marriage laws serve better than a redefined marriage policy would, then it is no more unjust not to recognize same-sex bonds than to exclude, say, romantic "throuples" – three-person romantic unions that are becoming increasingly common.

There is no denying the long and tragic history of cruelty toward men and women who experience same-sex romantic attraction or identify as other sorts of sexual or gender minorities. Such persons have known ridicule, discrimination, and even violence. But there is no clear evidence that people motivated by hatred would be moved by changes in marriage policy. In fact, for *this* purpose, the law makes a blunt instrument: revamping it has the unintended harms reviewed above; and doing so precisely to mark out who is "normal" might, again, further marginalize those who, for whatever reason, remain unmarried – or who grow up in households led by unmarried parents.

V. States have the authority and a moral claim to be able to determine (a) which social purposes to serve by their marriage law, (b) how best to meet the needs of unrecognized relationships and the children reared within them, whatever their marriage policy, and (c) how to balance diverse moral and dignitary claims.

As explained above, the States can reasonably be concerned that legally redefining marriage as Petitioners propose would erode the social expectations promoted by the legal recognition of marriage as the union of a husband and wife, particularly the expectation that each child will be reared wherever possible by his or her own mother and father.

There is, of course, good faith disagreement about the validity of this concern. Some who question it will assume a different set of proper purposes of marriage law, and argue on that assumption that the States' marriage laws serve only to stigmatize the close emotional bonds it fails to recognize.

There are also disputes about whether the public goods served by the historic definition of marriage (including dignitary goods for parents and children spared the stigma of divorce by the stabilizing norms of the historic conception of marriage) are worth what some will see (despite the arguments above) as trade-offs for the practical or social interests of people in same-sex, and perhaps also multiple-partner and other non-traditional consensual bonds for which mainstream advocacy has been growing. Controversial,

too, will be whether it is more efficient, expansive, and effective to meet concrete needs wherever they arise, apart from marriage law.

But such questions require balancing the pros and cons of various policy proposals. So they are quintessential policy judgments, not matters of constitutional law.

Just last term, this Court wrote forcefully of the importance of allowing citizens of the States to set policy even when the questions addressed involve matters of great controversy. The Court upheld a Michigan constitutional amendment enacted, like the Respondent States' marriage laws, "[a]fter a statewide debate." *Schuette v. BAMN*, 134 S.Ct. 1623, 1629 (2014). Writing for the plurality, Justice Kennedy made clear that federal courts "may not disempower the voters from choosing which path to follow" when "enacting policies as an exercise of democratic self-government." *Id.* at 13. The plurality characterized the voters' action as "exercis[ing] their privilege to enact laws as a basic exercise of their democratic power." *Id.* at 15.

Justice Kennedy's words fit well the marriage laws at issue in this case: "freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.* at 15-16. This is true even though a

controversy "raises difficult and delicate issues" and embraces "a difficult subject." *Id.*

Justice Kennedy rejected the idea "that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate." *Id.* at 16. To accept this idea would have been "an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* He concluded: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 17.

In his concurrence, Justice Breyer explained that "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits" of race-conscious programs. *Id.* at 3 (Breyer, J., concurring). This passage too is instructive in this case, where the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of preserving marriage as the union of a husband and wife or redefining it to include same-sex and perhaps other types of partnerships. Citizens of a republic have a moral claim to be allowed to participate in deliberating and deciding such matters. They have the right to have their opinions and their votes counted.

In this case that moral claim involves the votes of some 41.7 million Americans[2] who cast their ballots for measures codifying conjugal marriage. Their decisions, expressed by orderly democratic means, merit respect. Respondents will address this case's connections to republican government in greater detail. We wish to stress the moral implications of such a right for the millions who voted for laws securing conjugal marriage.

Behind the "theory of original, and continuing, consent of the governed," *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment), lies what Lincoln called "the leading principle – the sheet anchor of American republicanism." And that is our system's commitment to the idea that "no man is good enough to govern another man without that other's consent." Abraham Lincoln, Speech on the Kansas-Nebraska Act (Oct. 16, 1854), *in* SPEECHES AND WRITINGS 328 (Don E. Fehrenbacher ed., 1989).

Judicial review is not an exception to government by consent. Courts have the duty to pronounce a law void when it contradicts the Constitution precisely in order to *vindicate* that principle in practice. Justice Jackson traces the connection between judicial power

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[2] That estimate is based on official State reports from statewide elections taking place between 1996-2012, where the issue of same-sex marriage appeared on the ballot. The total number of voters approving ballot measures for conjugal marriage in the various states was then aggregated.

and popular consent: "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

But finding – indeed, inventing – a constitutional right to same-sex marriage would deprive millions of voters of their right to government by consent on one of the most morally fraught questions of our day. The people expressed their consent to laws securing conjugal marriage, and neither the constitutional text nor any principle of law fairly derived from it offers any reason to nullify their choice. Clearly, State decisions reflecting the views of citizens about a matter as fundamental as the definition of marriage – the foundation of the family and all society – are entitled to deference and respect. The people of the States must be left free to reconcile moral claims and interests rather than being compelled to accept the federal courts' settlement of such delicate considerations.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the judgment below.

Respectfully submitted,

ROBERT P. GEORGE
Counsel of Record
ROBINSON & MCELWEE
700 Virginia Street East
Suite 400
Charleston, WV 25301
(304) 344-5800
rgeorge@princeton.edu

LIST OF *AMICI CURIAE*

Robert Nagel
Ira C. Rothgerber Jr. Professor of Constitutional Law
University of Colorado School of Law

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Eddie Clark Harding Professor Emeritus
The Committee on Social Thought and the College
The University of Chicago

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Rice University

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Northwest Nazarene University

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Director
William E. and Carol G. Simon Center on
Religion and the Constitution
Witherspoon Institute

Diana Furchtgott-Roth
Former Chief Economist
U.S. Department of Labor

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Associate Professor
Dept. of Civil & Environmental Engineering
Princeton University

Kenneth Grasso
Professor and Chair
Department of Political Science
Texas State University

John Haas
President
International Institute for Culture

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Princeton University

Carson Holloway
University of Nebraska, Omaha

Austin Hughes
Carolina Distinguished Professor
Department of Biological Sciences
University of South Carolina

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Samuel Bard Professor of Medicine; Chair,
Department of Medicine
Columbia University College of Physicians
and Surgeons

Patrick Lee
John N. and Jamie D. McAleer Chair in Bioethics
Franciscan University of Steubenville

Matthew Levering
Perry Family Foundation Professor of Theology
Mundelein Seminary

Daniel Mark
Department of Political Science
Villanova University

Russell Moore
President
Ethics & Religious Liberty Commission
Southern Baptist Convention

Michael Pakaluk
Professor of Philosophy
Ave Maria University

Dermot Quinn
Professor
Department of History
Seton Hall University

R.R. Reno
Institute on Religion and Public Life

Eugene Rivers
Chief Policy Adviser to the Presiding Bishop
Church of God in Christ (COGIC)

Jacqueline Rivers
Director
Seymour Institute for Black Church and
Policy Studies

Ignacio Rodriguez-Iturbe
James S. McDonnell Distinguished University Professor
Department of Civil and Environmental Engineering
Princeton University

Ronald J. Rychlak
Professor of Law
University of Mississippi School of Law

Alfred K. Siewers
Associate Professor
Bucknell University

Jim Towey
President
Ave Maria University

Michael Uhlmann
Professor of Government
Claremont Graduate University

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Professor of Epidemiology
School of Public Health
Harvard University

Maria Alejandra Vanney
Professor
School of Law
Austral University

Graham Walker
Senior Research Scholar
Witherspoon Institute

Micah Watson
Associate Professor of Political Science
Union University

Matthew Wright
Torrey Honors Institute
Biola University